Supreme Court, U. S.
FILED
APR 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1455

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDGAR H. GILLOCK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES F. NEAL
JAMES V. DORAMUS
NEAL & HARWELL
800 Third National Bank Building
Nashville, Tennessee 37219

HAL GERBER
GERBER, BERNSTEIN, GERBER & WINESTONE
3121 100 North Main Building
Memphis, Tennessee 38103

Counsel for Respondent

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

	Page
Jurisdiction	1
Counterstatement of Question Presented	1
Constitutional Provisions and Rule Involved	2
Counterstatement of the Case	2
A. The Allegations	2
B. The Suppression Order	4
Reasons for Denying the Writ	6
A. The Decisions of the Other Circuits	6
1. The Seventh Circuit Case of United States v. Craig and the First Circuit case of United States v. DiCarlo involve collateral issues	6
2. The Third Circuit Case of In Re Grand Jury Proceedings	8
B. The Opinion of the Sixth Circuit Correctly Analyzes the Common Law History of the Privilege, and Recognizes the Existence of the Privilege	9
1. The Privilege is a limited one and does not foreclose prosecution	9
2. This Court and Federal Common Law have consistently recognized the necessity for a Legislative Privilege	10
Conclusion	14

CITATIONS

Cases:

Branzburg v. Hayes, 408 U.S. 665 (1972) 9

City of Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976) 11

Costello v. United States, 350 U.S. 359 (1956) 8

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 12

Imbler v. Pachtman, 424 U.S. 409 (1976) 10

In re Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977) 5, 8, 9

Kotteakos v. United States, 328 U.S. 750 (1946) 8

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, No. 77-1327, 47 U.S.L.W. 4256 (March 5, 1979) 10, 11

State v. Grosch, 177 Tenn. 619, 152 S.W.2d 239 (Tenn. S.Ct. 1941) 3

Tenney v. Brandhove, 341 U.S. 367 (1951) 10, 11, 13

United States v. Brewster, 408 U.S. 501 (1972) 7, 10

United States v. Calandra, 414 U.S. 338 (1974) 8

United States v. Craig, 528 F.2d 773 (7th Cir.), cert. denied, 425 U.S. 973 (1976) (Craig I), rev'd, 537 F.2d 957 (en banc), cert. denied, 429 U.S. 999 (1978) (Craig II) 6, 8

United States v. DiCarlo, 565 F.2d 802 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978) 6, 7, 8

United States v. Johnson, 383 U.S. 169 (1966) 7, 10, 12, 13

Younger v. Harris, 401 U.S. 37 (1971) 12

Constitutions, Statutes and Rules:

United States Constitution:

Article I, Section 6 .....10, 11

Amendment X 2, 12

Alaska Constitution Article II, Section 6 11

Hawaii Constitution Article III, Section 8 11

18 U.S.C. § 1951 2

18 U.S.C. § 1952 3

18 U.S.C. § 3731 2

Iowa Code § 2, 23 (1967) 11

Gen. Stats. North Carolina § 120-9 (1974) 11

Rule 501, Federal Rules of Evidence 5, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1455

UNITED STATES OF AMERICA,
Petitioner,

vs.

EDGAR H. GILLOCK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Respondent agrees with Petitioner's statement of jurisdiction.

COUNTERSTATEMENT OF QUESTION PRESENTED

Is a State Legislator, who is a defendant in a federal criminal prosecution, entitled to a speech or debate privilege according to the principles of the common law, as interpreted in light of reason and experience?

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Petitioner has accurately stated the pertinent constitutional provisions and the rules applicable in this action, although it has not set forth the Tenth Amendment to the United States Constitution, which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

COUNTERSTATEMENT OF THE CASE

The Petitioner's statement of this case does not accurately set forth the substance of the pending allegations and overstates the scope of the suppression order. Subject to these exceptions and without admitting the truth of any of the factual allegations,[1] Petitioner's statement of the case is accepted. Accordingly, Respondent submits the following points for the purpose of clarification.

A. The Allegations.

Two separate categories of alleged transactions provide the basis for the indictment in this action. Count One purports to charge an offense pursuant to 18 USC § 1951 on the grounds that Senator Gillock:

---

[1] This case comes before the Court as an appeal by the Government from an order suppressing evidence entered prior to the trial of this matter, pursuant to 18 U.S.C. §3731. Accordingly, the Government's broad characterization of the proof as "respondent's extortion scheme", Petitioner's Brief at 9, is their own, and not the result of a finding by a jury or the Court. Respondent has entered a plea of not guilty, and will dispute the truth and accuracy of these statements to the fullest possible extent at the trial of this matter.

> [u]nder color of official right, as an elected member of the Tennessee General Assembly holding the position of Senator . . . [attempted] to obtain money . . . by preventing the transportation of James Michael Williams from the State of Tennessee. . . .

Count Two charged the same actions, in substance, and has been dismissed.[2]

With respect to these charges, it should be noted that Senator Gillock, who had no authority under the Tennessee Constitution to block or otherwise challenge the Governor's extradition power, *State v. Grosch*, 177 Tenn. 619, 152 S.W.2d 239 (Tenn. S.Ct. 1941), allegedly requested an opinion from the Attorney General of Tennessee on whether extradition could be ordered for "Extradition on a Misdemeanor." (App. A at 43a)[3]

The second so-called "scheme" referred to in Counts Three through Six in the indictment was not allegedly "to procure master electrician's licenses for four individuals", Petitioner's Brief at 4, but to sponsor legislation which would provide for the reciprocity of electrician's licenses between various counties in Tennessee. (App. A. at 46a-49a)

---

[2] Count Two, which purported to charge an offense under 18 U.S.C. §1952, has been dismissed by the District Court for failure to state an offense and the United States Court of Appeals for the Sixth Circuit dismissed an appeal by the Government on the grounds that the appeal was not timely filed. This count charged Senator Gillock with "agreeing to exercise influence under color of his office . . . in order to intercede taking advantage of deference accorded him and prerogatives available to him. . . ." in such a way as to prevent extradition. Although this count alludes to "an attempt to distribute the proceeds of a bribe," there is no allegation that a bribe was acually made or tendered.

[3] Parenthetical references to "App." refer to the appendices of Petitioner's Brief.

B. **The Suppression Order**

The Petitioner's characterization of the suppression order overstates the effect of the suppression order on the Government's case. When the District Court entered its order of suppression, the Government was given great latitude in its proof, and the Court of Appeals further expanded the Government's right to introduce evidence. Among the "few limited items," Petitioner's Brief at 5, which were not suppressed by the District Court (and are not mentioned in the Petitioner's Brief) is proof that:

> Approximately two weeks after the initial meeting the defendant called and asked the four individuals to come to his office. The defendant advised them that he had a way to enable them to obtain a master's license but that it would cost them $5,000 each. The defendant explained that he could cause legislation to be enacted by the Tennessee General Assembly which would provide for reciprocity in licensing. The legislation would enable an individual who could not pass the difficult test in Shelby County, or Memphis, to obtain a license in another county, or municipality, where the test was not as difficult, and then require the larger county or municipality to recognize the master's license obtained elsewhere. The defendant explained that the $5,000 fee would be on a contingency basis, that is, if the individuals, or at least one of them, did not obtain their master's license within one year, their money would be refunded. Shortly thereafter, two of the four individuals put $5,000 in escrow pursuant to the defendant's proposition. One of the individuals had the defendant execute a written agreement. (A copy of that agreement is attached as Exhibit I.)

(Item No. 10, App. A at 46a-47a) The suppression order and the Government's offer of proof (App. A. at 39a-51a; App. E at

59a-64a) further demonstrate the wide latitude granted to the Government by the District Court's decision. Further evidence that the Government overstates the impact of the Court's order is the fact that, at the time the District Court's Order of Suppression was entered, the Government advised the Court that it was prepared to go to trial on the basis of the proof which had not been suppressed (App. E at 74a).

The Petitioner's discussion of the opinion below casually suggests that the Sixth Circuit expressly held that two other Courts of Appeal have "squarely held" that Rule 501 does not encompass the privilege, Petitioner's Brief at 6. This is correct insofar as the Court of Appeals found that two other Courts of Appeal "supply well-argued opinions on both sides of the general question we confront here." (App. A at 15a.) The petitioner's statement does not taken into account that the Sixth Circuit also noted the Third Circuit opinion in *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977) and that:

> [T]he long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that history in the cases we have cited from the Supreme Court, fully justify our affirming Chief Judge Brown in his protection of the privilege in this case.

(App. A at 15a.)

REASONS FOR DENYING THE WRIT

Petitioner has asked this Court to grant its petition for a writ of certiorari on the grounds that the issue of a legislative privilege is "an important and recurring question" and that the opinion below "squarely conflicts with the decisions of two other courts of appeals." Petitioner's Brief at 7. Although there is an apparent conflict between the opinions of the Sixth and Third Circuits on the one hand and the Seventh and First Circuits on the other hand, upon close scrutiny the Sixth and Third Circuits are the only Courts to squarely address this issue. More importantly, the Sixth and Third Circuits agree that there is a federal common law speech or debate privilege for a state legislator.

Despite the apparent breadth of the Seventh and First Circuit opinions, the privilege issue is collateral to other issues presented therein, such as waiver, and they therefore do not stand in direct conflict with the opinions of the Sixth and Third Circuits. Moreover, notwithstanding even an apparent conflict, it is clear that the common law, as interpreted in light of reason and experience, supports both the opinion below and the opinion of the Third Circuit and that there is no need for this Court to address this issue.

A. The Decisions of the Other Circuits

1. The Seventh Circuit case of United States v. Craig and the First Circuit case of United States v. DiCarlo involve collateral issues.

Although two circuits may have suggested that they would not follow the Sixth Circuit's rule, they do not squarely address this issue. First, in *United States v. Craig*, 528 F.2d 773 (7th Cir.), *cert. denied*, 425 U.S. 973 (1976) (Craig I), *rev'd*, 537 F.2d 957 (*en banc*), *cert. denied* 429 U.S. 999 (1978) (Craig II), even the four judges of the Seventh Circuit who recognize the privilege agreed that the state legislator had waived any legislative privilege he might otherwise assert by testifying before the grand jury. Accordingly, it can be argued that it was unnecessary to determine whether in fact there was a privilege. In the instant case there is no issue of waiver and the issue of the legislative privilege has been preserved by a Motion to Suppress.

There is no issue of waiver in *United States v. DiCarlo*, 565 F.2d 802 (1st Cir. 1977), *cert. denied*, 435 U.S. 924 (1978), but a different principle is involved. In *DiCarlo*

> the charges against DiCarlo were not "based" on his legislative conduct, but on his conduct outside of the legislature. . . .

565 F.2d at 805. Although the Court rejected the privilege, it did so on the narrow grounds that:

> it should not be extended when the crime itself was entirely outside of any legislative act, and the conduct assertedly immunized[4] was introduced for its corroborative evidentiary effect.

565 F.2d at 806. After reaching its decision on these narrow grounds, the Court expressed its agreement with the dissent in the Third Circuit that "[i]f there is (no limitation . . . on

---

[4] The Court uses the terms "privilege" and "immunity" interchangeably, without apparently recognizing the difference in the two concepts as an evidentiary matter. The Court even goes so far as to state that "no civil or criminal action will lie for whatever a [federal] legislator says on the floor," 565 F.2d at 805, *citing United States v. Johnson*, 383 U.S. 169 (1966). On the contrary, the speech or debate privilege does not "make Members of Congress super-citizens, *immune from criminal responsibility.*" *United States v. Brewster*, 408 U.S. 501, 516 (1972) (emphasis supplied).

enforcement), we see no basis for creating a limitation that handicaps proof." 565 F.2d at 807.

The Third Circuit might recognize a different rule if the Government's case is "based on" legislative acts or if this issue had been raised pre-trial. In any event, given the Court's careful division of items of proof into legislative and non-legislative categories (which is unnecessary if the Court flatly rejects the privilege), *DiCarlo* stands for the proposition that the use of the legislative evidence was harmless; it was unnecessary to determine if the admission of the evidence was improper. *See Kotteakos v. United States,* 328 U.S. 750 (1946).

2. **The Third Circuit Case of In Re Grand Jury Proceedings.**

Finally, the Petitioner has dismissed the *In re Grand Jury Proceedings,* 563 F.2d 577 (3d Cir. 1977), holding as dictum and, further, has improperly characterized that holding as recognition of a "somewhat circumscribed privilege." Petitioner's Brief at 9, n. 5. On the contrary, *In re Grand Jury Proceedings* clearly holds that a legislative privilege applies *in a grand jury proceeding* and defines it as the "personal privilege" of a legislator to exclude *"any evidence* of his action performed in a strictly legislative capacity, motivations for such action, or utterances in the course of his legislative duties." 563 F.2d at 585 (emphasis supplied). The existence *vel non* of the legislative privilege was the threshold consideration in *In re Grand Jury Proceedings,* and the Court was required to make this initial determination without reference to the weight of the evidence, as in *DiCarlo,* or the fact of waiver, as in *Craig.*

It is noteworthy that the privilege was applied to evidence presented to a grand jury, which traditionally has broad investigatory powers and to which the Exclusionary Rule has not been applied. *See United States v. Calandra,* 414 U.S. 338, 349-50 (1974); *Costello v. United States,* 350 U.S. 359 (1956). The Court reiterated the importance of its holding:

> Though it may hamper somewhat prosecution of the few who are guilty of betraying the public trust, the privilege is needed to protect the great majority of legislators who are conscientious in the performance of their duties.

563 F.2d at 583.

Accordingly, there is no "square conflict" between the circuits on this issue. The only two circuits to squarely face this issue, the Third Circuit and the Sixth Circuit, have agreed and have upheld the legislative privilege.

B. **The Opinion of the Sixth Circuit Correctly Analyzes the Common Law History of the Privilege, and Recognizes the Existence of the Privilege**

1. **The privilege is a limited one, and does not foreclose prosecution.**

The Petitioner is correct in its assertion that the opinion below will "impair" the Government's ability "to prosecute venal state legislators," Petitioner's Brief at 7; indeed, the principle of legislative privilege will even "impair" the Government's ability to prosecute innocent state legislators.[5] However, this "impairment" does not rise to the level of an immunity. The Court of Appeals carefully reviewed the material suppressed by the District Court, reversed the suppression order in part, and expanded the categories of proof which will be admissible at trial.

---

[5] A limitation on the Government's proof is hardly improper merely because it is a limitation. A privilege, of course, always constitutes a limitation on proof and, although a privilege may give an advantage to one party, and may even appear unfair in a particular case, the reason and experience of the common law have shown that in certain instances there are higher principles to be served than the right to every person's evidence. As this Court has noted " 'the public . . . has a right to every man's evidence,' *except for* those persons protected by a constitutional, common-law, or statutory privlege." *Branszburg v. Hayes,* 408 U.S. 665, 688 (1972) (emphasis supplied).

In any event, the impairment upheld herein is no greater than would be required if Respondent were a federal legislator. The Courts below merely "viewed the state legislative privilege as being on a parity with the similar federal privilege. . . ." *United States v. Johnson, supra* at 180; *see Imbler v. Pachtman,* 424 U.S. 409, 419, n. 15 (1976); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* No. 77-1327, 47 U.S.L.W. 4256 (March 5, 1979).

Furthermore, and contrary to the Petitioner's implication, the decision *sub judice* does not involve immunity from prosecution and, on the basis of the record in this case, the privilege recognized certainly would not bar this prosecution. *See United States v. Johnson, supra; United States v. Brewster,* 408 U.S. 501, 512 (1972).

2. **This Court and Federal Common Law Have Consistently Recognized the Necessity for a Legislative Privilege.**

The only issue in this case is whether "the principles of the common law" compel recognition of this Respondent's legislative privilege in a federal criminal proceeding "in the light of reason and experience." Rule 501, Fed. R. Evid. Such a common law principle is hardly "inconsistent with the relevant precedents of this Court," Petitioner's Brief at 7, and has in fact been recognized as the source of civil immunity in federal civil actions against state legislators. In this term, the Court approved its prior holding in *Tenney v. Brandhove,* 341 U.S. 367 (1951), and stated that "such [civil] immunity *was consistently recognized in the common law* and was taken as a matter of course by our Nation's founders." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* No. 77-1327, 47 U.S.L.W. 4256, 4259 (March 5, 1979). The Court recognized that the federal Speech or Debate clause, U.S. Const. Art. I, §6, is not applicable to state legislators, *id.* at 4260, and that the "States are of course free to adopt similar clauses in

their own Constitutions, and many have in fact done so." 47 U.S.L.W. at 4260. These clauses, in and of themselves, ". . . reflect the central importance attached to legislative freedom in our Nation." *Id.* Most importantly,

> the absolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal [common] law; the decision did not depend on the presence of a speech or Debate Clause in the Constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators.

Id. It was further noted that "[u]nderlying the decision in *Tenney* was a recognition of the unique status of the legislative privilege, maintained for several centuries at common law and enshrined in the Federal Constitution, Art. I, §6, as well as in all but seven of the States' constitutions." *Id.* (Marshall J., dissenting in part).[6]

Both *Lake Country* and *Tenney* are civil actions and, in civil actions, the common law gives rise to immunity for "federal, state, and regional legislators." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra* at 4260. The federal common law principle which is the source of the civil immunity also gives rise to a limited evidentiary privilege in a criminal proceeding, since

---

[6] Forty-three of the states have specific provisions in their constitutions protecting the speech or debate privilege. *See, Tenney v. Brandhove, supra* at 375, n. 5; Alaska Const. Art. II, §6; Hawaii Const. Art. III, §8. Two states, Iowa and North Carolina, specifically provide for the speech or debate privilege by statute. Iowa Code §2, 23 (1967), Gen. Stats. N.C. §120-9 (1974). In addition, California, Mississippi, Nevada and South Carolina provide for a privilege from arrest for legislators. *Tenney v. Brandhove, supra* at 375, n. 5. Only Florida has no specific statutory constitutional provision concerning legislative privilege but the courts may recognize a common law privilege in that state. *See City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1256, n. 8 (5th Cir. 1976).

> [i]t is apparent from the history of the clause that the privilege was not born primarly of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.

United States v. Johnson, 383 U.S. 169, 180-81 (1966). Moreover, this Court has recently held that

> when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch. *Kilbourn v. Thompson; Tenney v. Brandhove; Doe v. McMillan; Dombrowski v. Eastland.* (citations omitted)

Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-03 (1975). Accordingly, if civil immunity is recognized for a state legislator in a federal civil action, on the basis of federal common law, then a state legislator who is a defendant in a federal criminal proceeding is entitled to an evidentiary privilege on those same principals of federal common law. *United States v. Johnson, supra,* at 180-81.

The necessity for the privilege is underscored by the nature of the delicate state-federal relationship, and our form of government is based on

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971); *see* U. S. Const. Amend. X. In coordinate branches of either the state or federal

governments, one branch may exercise its check against the other. Thus a federal legislator may not only assert his privilege but also vote to reject the legislative programs of the executive or to limit the jurisdiction of the judiciary. A state ~~legislat~~or has no such countervailing power and is literally at the mercy of the federal government.

History has shown that the unenforceable promises of good faith by the executive are insufficient to secure the liberty of thought and expression which are necessary for the proper functioning of the state legislatures. At the inception of our form of government surely the states never conceived that by joining the Union they would forfeit the legislative independence which flows from the speech or debate privilege of common law since "[t]he provision in the United States Constitution was a reflection of political principles already firmly established in the States." *Tenney, supra* at 373. Thus,

> [a]s other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act *without fear of criminal and civil liability.*

Id. at 375 (emphasis supplied). This privilege is essential so that legislators may "[e]xecute the functions of their office without fear of prosecutions, *civil or criminal.*" *Tenney, supra* at 374 (emphasis supplied).

Accordingly, the federal common law recognizes a privilege for a state legislator in a federal criminal proceeding. The privilege in a criminal case and immunity in a civil case are both products of centuries of "reason and experience." If there is any absence of authority in support of Respondent's contentions, it is only because "the tradition of legislative privilege is so well established in our policy, there is very little judicial illumination of this clause." *United States v. Johnson, supra* at 179.

CONCLUSION

The opinion of the Court of Appeals is correct, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES F. NEAL

JAMES V. DORAMUS
NEAL & HARWELL
800 Third National Bank Building
Nashville, Tennessee 37219

HAL GERBER
GERBER, BERNSTEIN, GERBER & WINESTONE
3121 100 North Main Building
Memphis, Tennessee 38103
Counsel for Respondent